Supreme Court, U.S.
FILED
JUN 4 - 2004
OFFICE OF THE CLERK

No. 03-1202

IN THE

Supreme Court of the United States

HEWLETT-PACKARD COMPANY EMPLOYEE BENEFITS ORGANIZATION INCOME PROTECTION PLAN,

Petitioner,

v.

DONALD JEBIAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

None of the four reasons advanced by respondent is sufficient to warrant denial of the petition, which presents an important and recurring question of federal law that has generated a three-way split of authority among the courts of appeals.

I. The Amendment To The ERISA Regulation Does Not Affect The Continuing Importance Of The Question Presented

Jebian first contends that review is unnecessary because the Department of Labor has amended its claims-processing regulation. Opp. 6-7 (citing 29 C.F.R. § 2560.503-1 (1998 & 2003)). He asserts that the new regulation differs from the old one in three "key respects" that purportedly "demonstrate that the question presented in the petition has no continuing importance." Opp. 7. Jebian is wrong.

1. Under the former regulation (and the Plan at issue here), an administrative appeal could be decided by the *same* person or entity that made the initial benefits determination. Under the amended regulation, the internal appeal must be decided by a person or entity *other than* the one that made the initial determination. As explained in the petition, "[t]he new regulation affects the *identity* of the person or entity with the discretionary authority to resolve internal appeals, but does not speak to the standard of review applicable if such appeals are deemed denied as a result of the passage of time limits set by regulation or plan documents." Pet. 22 n.9.

Jebian contends that "[t]he new rule supports the conclusion that where an administrative appeal is concluded not on the merits, but by virtue of a failure to timely decide the appeal, district court review should be conducted de novo." Opp. 7. But this assumes the answer to the very question that has divided the Circuits—*i.e.*, whether the administrator's

decision to allow an appeal to be denied by the passage of time is or is not a decision "on the merits" (or, relatedly, an exercise of discretion). Jebian makes no effort to respond to the Plan's showing that even a failure to act is, under the common law of trusts, reviewed for abuse of discretion. Pet. 18. The new regulation has no bearing on this issue.

Jebian also contends that "the conclusions reached by the circuit courts under the old regulation provide little or no insight on how the issue will play out under the new one." Opp. 8. But he offers nothing to support this bald speculation. Nor does he attempt to refute the extensive treatment of the new regulation in the petition (at 3 nn.1-2, 21-22 n.8, and 22 n.9), or to rebut the Plan's conclusion that "[t]he amendments to the ERISA regulation do not resolve the issue of what standard of review applies in the context of a deemed denial." Pet. 22. Most importantly, the new regulation does not purport to, and does not in fact, resolve the existing conflict among the courts of appeals on this issue.

2. Under the former regulation (and the Plan at issue here), appeals were "deemed denied" upon the expiration of the established time period. Under the amended regulation, a claimant is "deemed to have exhausted" administrative remedies. Jebian contends, wrongly, that the new regulation "eliminates" the "notion" of a deemed denial, such that "there would, by regulatory definition, be no decision or exercise of discretion to which the trial court could defer." Opp. 8. As explained in the petition (at 20-21), the revised language merely codifies this Court's recognition that deemed denials enable a claimant to initiate judicial proceedings without further participation in the administrative process. *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 144 (1985). Independently of any regulation, the Plan (like most plans) provides that appeals are deemed denied following passage of a certain period of time. Pet. App. 142a. As this Court has explained, the level of discretion afforded adminis-

trative decisions "is simply a matter of plan design"; the standard of review is *not* controlled by statute or regulation. *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 385-86 (2002). Thus, the question presented remains live as a matter of plan design notwithstanding the amendment of the claims-processing regulation.

3. Jebian points to the "regulatory history" of the amended regulation and contends that the Department of Labor has indicated that "de novo judicial review is appropriate" in cases such as this one. Opp. 9-11. As explained in the petition (at 21-22 n.8), the Plan reads this same history—and the Department's interpretive guidance, which Jebian ignores—quite differently. The Labor Department has expressly recognized that where a plan establishes procedures that meet regulatory standards, the plan should receive deference so long as it substantially complies with those standards. *See* Pet. 21-22 n.8. But the parties need not further debate the point. If the Court has any questions in this regard, it would be appropriate to invite the Solicitor General to file a brief explaining the views of the Labor Department.

II. This Court Frequently Reviews Summary Judgment Rulings Concerning The Standard Of Review

Jebian's second principal argument is that certiorari should be denied because the decision below is interlocutory. Opp. 11. The purpose of restraint while a case is interlocutory is to avoid "unnecessary and inappropriate constitutional adjudications," Robert L. Stern et al., *Supreme Court Practice* § 18.1 at 802 (8th ed. 2002), or to avoid inconvenience, litigation costs, and "delay in determining ultimate justice." *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152-53 (1964). Where, however, a case "involve[s] an issue 'fundamental to the further conduct of the case,'" review may well be appropriate. *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947) (reviewing interlocutory ruling) (citation omitted). Procedural rulings that significantly influence the course of further liti-

gation frequently give rise to interlocutory review. *See, e.g.*, *Beacon Theatres* v. *Westover*, 359 U.S. 500, 501 (1959) (granting mandamus to address right to jury trial); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 682 (1949) (reviewing jurisdictional issues following appellate reversal of grant of motion to dismiss). This Court reviews decisions reversing summary judgment—the precise posture presented here—on a regular basis. *See, e.g.*, *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 193-94 (2003); *City of Los Angeles* v. *David*, 538 U.S. 715, 716 (2003); *Texas* v. *Lesage*, 528 U.S. 18, 19-20 (1999).

Cases involving the applicable standard of review present the quintessential candidate for interlocutory review. *See, e.g.*, *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 108 (1989) (reviewing appellate reversal of grant of summary judgment to address circuit split concerning standard of review in ERISA benefits cases). In such cases, the issue often is crystallized only at an intermediate stage and may later be rendered moot or unreviewable. In this case, for example, the standard of review was outcome-determinative at the appellate level. And while (if the decision below stands) there will be further proceedings in the district court, the Plan may be effectively precluded from seeking review of the Ninth Circuit's decision if it prevails on remand. Thus, the procedural posture of the case is no obstacle to this Court's exercise of its discretionary certiorari jurisdiction. *See* Stern et al., *supra*, § 4.18 at 260 ("the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation").

III. The Question Presented Has Deeply Divided The Courts Of Appeals

Jebian's third argument is that there is no "real" conflict among the Circuits. Opp. 13. Although numerous federal

judges, including the authors of both opinions below, have expressly recognized the conflict at issue, Jebian attempts to explain it away. Jebian is wrong; the conflict is genuine.

1. Jebian concedes that "[a]t first glance, a review of the decisions dealing with the question [presented] indicates a conflict" but asserts that "[a] closer review" indicates that "[t]he various courts are working their way to a consensus." Opp. 13. Of course, that they have not reached "consensus" is another way of acknowledging that there is an existing conflict, as the Plan has previously demonstrated. Pet. 11-17.

The Judiciary is not as sanguine as Jebian regarding the absence of a conflict in this area. In the decision under review, both the majority and the dissent expressly noted the conflict among the Circuits. Pet. App. 12a-14a ("conclusions in similar cases vary"), 21a ("the majority's conclusion conflicts with all but one of the decisions that have dealt with the precise issue we face"). The Tenth and Eleventh Circuits, likewise, have observed the same conflict. *Gilbertson* v. *Allied Signal, Inc.*, 328 F.3d 625, 633 (10th Cir. 2003); *Torres* v. *Pittston Co.*, 346 F.3d 1324, 1332-33 (11th Cir. 2003).

And a number of district courts, themselves struggling with the appropriate standard of review, have noted the conflict of authority among the appellate courts. *See, e.g.*, *Campanella* v. *Mason Tenders' Dist. Council Pension Plan*, 299 F. Supp. 2d 274, 289-90 (S.D.N.Y. 2004) (reviewing the various approaches that have developed and choosing deferential review); *DiCamillo* v. *Liberty Life Assurance Co.*, 287 F. Supp. 2d 616, 626 (D. Md. 2003) (same: "applying a *de novo* standard of review where deference is generally warranted solely because of a procedural error is an extreme measure that is inconsistent with the settled law of ERISA"); *Wertheim* v. *Hartford Life Ins. Co.*, 268 F. Supp. 2d 643, 664 (E.D. Va. 2003) (same: "The majority's holding in [the original panel opinion in] *Jebian* is unpersuasive. Instead, it is Judge Tashima's dissent in *Jebian* that has it right . . . .").

The Plan submits that these jurists are more familiar with identifying "real" conflicts than Jebian is.

2. Jebian's attempt to explain away the conflict fares no better than his effort to deny its existence. Jebian begins by depicting the ruling below as similar to both the Tenth Circuit's *Gilbertson* ruling and the Third Circuit's decision in *Gritzer* v. *CBS, Inc.*, 275 F.3d 291 (3d Cir. 2002). Opp. 13. Although all three courts ultimately applied a *de novo* standard of review, the paths they followed differed significantly. In *Gritzer*, the Third Circuit adopted a clear and automatic rule that the occurrence of a deemed denial results in a forfeiture of discretion and *de novo* review. 275 F.3d at 296. In *Gilbertson*, by contrast, the Tenth Circuit concluded that "a 'substantial compliance' approach is appropriate .... Accordingly, our holding does not require that every decision that comes on the 61st or 121st day following the claimant's notice of appeal must be subject to plenary review in federal court." 328 F.3d at 634-35.

In the ruling below, the Ninth Circuit initially stated that "[d]eemed denials are not exercises of discretion. They are therefore undeserving of deference under *Firestone*, and a *de novo* standard of review applies." Pet. App. 11a-12a. That formulation of the rule tracks *Gritzer*. Later, however, the court paid lip service to the Tenth Circuit's "substantial compliance" approach, suggesting that deferential review might be appropriate for "inconsequential violations of the deadlines." *Id.* 14a-15a. As shown in the petition (at 16 n.7), the Ninth Circuit ignored the district court's finding of substantial compliance in order to evade the exception it purported to recognize, and in a subsequent case that court has demonstrated that essentially all procedural missteps will result in *de novo* review. In reality, the Ninth Circuit adheres to the inflexible *de novo* rule employed by the Third Circuit, and that rule differs markedly from the Tenth Circuit's substantial compliance approach. *See* Pet. 13-17.

Jebian then argues that the Eighth Circuit's case law "is in conformity with" the decisions of "the Third, Ninth, and Tenth" Circuits. Opp. 14-15. Jebian misunderstands the Eighth Circuit's decisions in *McGarrah* v. *Hartford Life Insurance Co.*, 234 F.3d 1026 (8th Cir. 2000), and *Seman* v. *FMC Corp. Retirement Plan for Hourly Employees*, 334 F.3d 728 (8th Cir. 2003). In *McGarrah*, the Eighth Circuit held that "the mere presence of a procedural irregularity is not enough to strip a plan administrator of the deferential standard of review" and that, in order to trigger *de novo* review, a claimant must demonstrate that the irregularity "raises 'serious doubts as to whether the result reached was the product of an arbitrary decision or the plan administrator's whim.'" 234 F.3d at 1031 (citation omitted). The court concluded that the record failed to demonstrate such doubts and, therefore, reviewed the administrator's decision for an abuse of discretion. *Ibid.*; *see also* Pet. 14-15. In *Seman*, the Eighth Circuit followed *McGarrah* and merely concluded that the record in that case raised sufficiently serious doubts as to the result to warrant *de novo* review. 334 F.3d at 733.

The principal difference between *McGarrah* and *Seman* is that in *Seman*, the claimant submitted the vast majority of his medical evidence after the initial denial of his claim, and the court was left without a final ruling by the administrator addressing the effect of that evidence on the claimant's appeal. In *McGarrah*, by contrast—as with Jebian's claim—the bulk of the medical evidence was submitted before the deemed denial. Thus, the Eighth Circuit operates from a presumption of deferential review and continues to focus on whether the process as a whole raises doubts regarding the soundness of the ultimate decision, a rule that contrasts starkly with the approach followed by the Third and Ninth Circuits.

Jebian also endeavors to sweep under the rug the clear holdings of the Fifth and Sixth Circuits applying an abuse of

discretion standard of review to deemed denials. Opp. 15-16. With regard to *Daniel* v. *Eaton Corp.*, 839 F.2d 263 (6th Cir. 1988), the best that Jebian can do is to observe that a different panel of the Sixth Circuit has noted, in a footnote that is plainly dictum, that there is "undeniable logic" in the *de novo* approach rejected in *Daniel*. Opp. 15. As the petition demonstrates (at 12 n.5), *Daniel* undeniably remains the law of the Sixth Circuit, and Jebian does not seriously dispute that point. He then blithely asserts that *Southern Farm Bureau Life Insurance Co.* v. *Moore*, 993 F.2d 98 (5th Cir. 1993), was "wrongly decided" because it purportedly is out of step with ERISA case law with respect to issues that are simply not presented in this case. Opp. 15. Jebian's contention that *Moore* was decided incorrectly does nothing to minimize the fact that the Fifth Circuit has adopted a rule that is directly contrary to the decision below, and he offers no basis for his implied conclusion that the Fifth Circuit would decide the issue differently today.

The inescapable reality is that the Circuits are deeply divided with respect to the standard of review applicable to deemed denials, and the various approaches show no signs of converging. Review by this Court is warranted.

IV. The Putative Correctness Of The Decision Below Is No Barrier To Review

Jebian's fourth, and final, ground for resisting certiorari is that the Ninth Circuit reached the correct result. Opp. 16. Right or wrong, however, the decision below exacerbates an existing circuit split that merits review.

Indeed, despite the grounding of ERISA in trust law, repeatedly recognized by this Court and many other courts, *see, e.g.*, *Firestone*, 489 U.S. at 111, Jebian side-steps entirely the detailed examination of the applicable trust law principles presented in the petition (at 17-21). Rather than responding to those arguments directly, Jebian offers a series of largely

speculative policy-based rationales to justify the result below. Opp. 16-21. Jebian's arguments lack merit

Jebian first argues that applying an abuse of discretion standard "would encourage claim administrators to make no decisions at all." Opp. 16. There is no evidence whatsoever to support such conjecture. Quite simply, no party stands to gain from a policy of not deciding benefits claims. Indeed, while a timely and well-reasoned explanation of the reasons for denying a claim may convince many a claimant not to pursue matters further, not issuing a decision virtually assures that a claimant will seek judicial review. And the complete failure to make any decision could well constitute an abuse of discretion. Pet. 18-19.

Jebian then turns his attention to the financial condition of disabled workers, who need their ERISA benefits "sooner rather than later." Opp. 17. The Plan agrees that meritorious benefits claims should be paid promptly, but the standard of review has no bearing on the timing of benefits payments. The whole point of the "deemed denied" provision of the former regulation and the related term in the Plan itself is to enable a claimant to seek prompt judicial review in the event that the administrator does not issue a final decision within a given period of time. That exception to the exhaustion requirement, rather than the standard of review, ensures that claimants receive their benefits in a timely fashion.

Jebian next takes issue with the Plan's argument that automatic *de novo* review for deemed denials will lead to more denials of benefits. Opp. 18; *see* Pet. 24. Jebian's skepticism notwithstanding, judges have voiced that same concern repeatedly. *See Gilbertson*, 328 F.3d at 634-35 ("Even in cases where additional medical information is clearly necessary for a proper decision, administrators would have an incentive to issue a final denial on the inadequate record in order to preserve their right to deferential review, rather than to wait for the information and risk losing defer-

ence."); Pet. App. 29a (Tashima, J., dissenting) ("the majority's decision will force plan administrators to deny ... claims within the permitted period, rather than to risk awaiting receipt of the required medical records so that a more reasoned decision, one based on a review of the full medical records, can be made").

Jebian's final argument, that the Plan grants discretion to the claims administrator only where the administrator acts within the time limits specified by the Plan (Opp. 20), merely assumes its conclusion, and it ignores the analysis of this issue presented in the petition (at 17-21). The Plan respectfully submits that the scope of administrative discretion in these circumstances warrants plenary review by the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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